

ORDINANCE NO. 1274-09

AN ORDINANCE GRANTING A NON-EXCLUSIVE  
TELECOMMUNICATIONS FRANCHISE TO TW TELECOM OF  
OREGON LLC.

WHEREAS tw telecom of oregon llc, ("Franchisee") wishes to enter into a franchise with the City of Tualatin ("the City") for purposes of offering telecommunications services; and

WHEREAS the City has jurisdiction and regulatory management over its public rights-of-way; and

WHEREAS the City is willing to exercise its authority and enter into a franchise agreement with Franchisee.

Now therefore,

**THE CITY OF TUALATIN ORDAINS AS FOLLOWS:**

**Section 1. Grant of authority.** The City grants the Franchisee a non-exclusive franchise to occupy City rights-of-way and appropriate utility easements for the construction, use, operation and maintenance of a telecommunications system for a period of ten years from the effective date of this agreement (the "term") except as set forth below.

**Section 2. Authority not exclusive.** The City reserves the right to grant rights to others to use its rights-of-way during the franchise term. The City may do any work on, over or under any street, alley, utility easement or other right-of-way. The Franchisee shall respect the rights and property of the City and other authorized users of easements and rights-of-way. This agreement does not confer any right, title, or interest in any public right-of-way on Franchisee beyond that expressly conferred in this agreement. Except as otherwise required by law, disputes between Franchisee and parties other than the City over use of the easements and rights-of-way under this agreement shall be submitted to the City for resolution. The City's decision may be appealed to any judicial or administrative body having appropriate jurisdiction. Both the City and the Franchisee expressly reserve all rights they may have under law to the maximum extent possible; neither the City nor the Franchisee shall be deemed to have waived any federal or state constitutional or statutory rights they may now have or may acquire in the future by entering into this agreement.

**Section 3. Performance.** During the term of this agreement, the Franchisee agrees to meet all the terms and conditions of Chapter 10-1 of the

Tualatin Municipal Code, which is incorporated into this agreement by this reference, except as follows:

- (a) City agrees that it will not remove Franchisee's equipment under TMC 10-1.150 until the City and Franchisee negotiate a solution for relocation or retrofitting so long as Franchisee does not unreasonably delay entering negotiations for such solution.
- (b) City acknowledges that as Franchisee is building its system and securing customers, it may have telecommunications equipment in the right-of-way that is not activated within one year but is not abandoned as contemplated by TMC 10-1.230 and 10-1.380. Therefore, City agrees that at such time as Franchisee intends to discontinue using or to remove any telecommunications network facility or facilities within the City, including actions pursuant to a City termination order, Franchisee shall submit a specific plan for such discontinuance or removal to the City Engineer for the City Engineer's approval. The City Engineer may allow Franchisee to abandon in place any facility, may require the Franchisee to remove or modify the facilities within the public rights-of-way or other public place or property, may cause the facilities to be removed at the Franchisee's expense, or may take any combination of these actions. Franchisee shall complete such removal or modifications in accordance with a schedule reasonably set by the City Engineer. Until such time that Franchisee's property is completely removed and all restorations to the public rights-of-way or other public places or property have been completed, Franchisee shall be responsible for all necessary repairs, relocations, and maintenance of the facilities in the same manner and degree as if the facilities were in active use, and Franchisee shall retain all liability for such facilities.
- (c) Franchisee does not require the City's consent to transfer, assign, lease, merge, or consolidate with any entity, firm or corporation which Franchisee controls, is controlled by or is under common control with or a third party except that such Affiliate or third party shall not succeed to Franchisee's rights hereunder unless that Affiliate or third party agrees to abide by the provisions of this franchise agreement.
- (d) Franchisee reserves the right to challenge any of the terms and conditions of TMC Chapter 10-1 under present or future applicable federal and state law.

**Section 4. Change of law; amendment of franchise agreement.** This agreement may be amended from time to time to conform to any changes in the controlling federal or state law or other changes material to this agreement. Each party agrees to bargain in good faith with the other party concerning such proposed amendments. This agreement may be amended or terminated by the mutual consent of the parties and their successors in interest.

**Section 5. Franchise fees.** As compensation for the benefits and privileges under its franchise and in consideration of permission to use the right-of-way of the City, the Franchisee shall pay a semi-annual franchise fee to the City during the duration of its franchise as follows:

- (a) The minimum semi-annual franchise fee shall be two thousand five hundred dollars (\$2500).
- (b) The franchise fee shall equal 5% of the Franchisee's gross revenues derived from Franchisee's provision of telecommunications facilities to retain customers and on all other gross revenues derived from Franchisee's provision of telecommunications services and telecommunications facilities to wholesale customers, including other telecommunications carriers. "Gross revenues" means gross revenue derived by tw telecom for the provision of telecom services originating or terminating in Tualatin and charged to a circuit location in Tualatin, regardless of where the circuit is billed or paid.
- (c) The annual franchise fee collectable from a telecommunications utility shall not exceed the maximum amount allowed under Oregon law. The City shall accept from a telecommunications utility, in full payment of the franchise fee, the maximum amount allowed under Oregon law. On request, the telecommunications utility must provide documentation to support its calculation.
- (d) Payment shall be made by January 30 and July 30 for the previous six-month period.
- (e) After the date this agreement becomes effective, if Oregon laws or regulations change the maximum franchise fee amount to be collected on telecommunications providers, the City may reopen Section 5 (b) of this agreement only for the purposes of raising the franchise fee in accordance with the revised law and Franchisee may reopen Section 5(b) of this agreement only for the purposes of reducing the franchise fee in accordance with the revised law.

**Section 6. Reports.** Within thirty days of receipt, Franchisee shall submit copies of all decisions, correspondences, and actions by any federal, state and local courts, regulatory agencies and other government bodies substantially and materially affecting its telecommunications obligations under this agreement. Upon advance written notice of at least thirty days, Franchisee shall make available to City such other nonproprietary information or reports pertinent to enforcing the Franchise in reasonable form and at such reasonable times as the City may request.

**Section 7. Taxes.** Nothing contained in this Agreement shall be construed to exempt the Franchisee from any license, occupation, or excise tax or assessment that is or may be lawfully imposed on all entities in the same business as the Franchisee.

**Section 8. Insurance.** Franchisee attaches and incorporates the Certificate of insurance consistent with the requirements of TMC 10-1.500, modified as:

Unless otherwise provided in a franchise agreement, each grantee shall, as a condition of the grant, secure and maintain the following liability insurance policies insuring both the grantee and the City, and its elected and appointed officers, officials, agents and employees as coinsured:

- (1) Comprehensive general liability insurance with limits not less than
  - (a) \$3,000,000 for bodily injury or death to each person;
  - (b) \$3,000,000 for property damage resulting from any one accident;
  - (c) \$3,000,000 for all other types of liability relevant to Grantee's Operations; and
  - d) Limits required herein may be satisfied through Grantee's Umbrella Liability Policy.
- (2) Automobile liability for owned, non-owned and hired vehicles with a limit of \$1,000,000 for each person and \$3,000,000 for each accident. Limits required herein may be satisfied through Grantee's Umbrella Liability Policy.
- (3) Worker's compensation within statutory limits and employer's liability insurance with limits of not less than \$1,000,000.
- (4) Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than \$3,000,000.
- (5) The grantee shall maintain liability insurance policies required by this Section throughout the term of the telecommunications franchise, and such other period of time during which the grantee is operating without a franchise, or is engaged in the removal of its telecommunications facilities. Each such insurance policy shall provide that contain the following endorsement:

"It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until 30 days after receipt by the City, by registered mail, of a written notice addressed to the Tualatin City Attorney of such intent to cancel or not to renew."

(6) Within 60 days after receipt by the City of said notice, and in no event later than 30 days prior to cancellation, the grantee shall obtain and furnish evidence to the City that the grantee meets the requirements of this Section.

(7) As an alternative to the insurance requirements listed above, a grantee may provide evidence of self-insurance subject to review and acceptance by the City.

(8) Grantees shall either provide insurance coverage as described above for their contractors and subcontractors or require that the contractors and subcontractors provide evidence of such insurance coverage as is required of contractors and subcontractors by Grantee before beginning work in the public rights of way.

**Section 9. Severability clause.** If any clause, sentence, or any other portion of this Agreement becomes illegal, null or void for any reason, the remaining portions will remain in full force and effect to the fullest extent permitted by law. If any material portion of the Agreement becomes illegal, null or void so that the intent of the Agreement is frustrated, the parties agree to negotiate replacement provisions to fulfill the intent of the Agreement consistent with applicable law.

**Section 10. Remedies.**

(a) If Franchisee fails to comply with a material provision of this Agreement or violates its terms, Franchisee will forfeit all rights and privileges granted by this Agreement. That forfeiture will not occur until after:

(A) City notifies Franchisee clearly and in detail, in writing, of the failure or violation; and

(B) Franchisee has ninety days after notice from City to comply with the provisions of this Agreement; or if the provision cannot be satisfied within the ninety-day period, to commence and diligently pursue compliance. If the failure or violation continues beyond the ninety-day period, or, if the cure cannot be made within ninety days, Franchisee fails to commence and diligently pursue compliance as required in this subparagraph, City, at its sole discretion, has the right to determine that the franchise is forfeited. Forfeiture of the franchise shall not relieve Franchisee from complying with the Tualatin Municipal Code on telecommunications.

(C) If Franchisee corrects the violation or commences and diligently pursues compliance within the ninety-day period, then no damages or other remedy shall be imposed.

(b) Notwithstanding the above, failure, default or violation by Franchisee shall not constitute grounds for the forfeiture of this franchise if due materially, substantially and reasonably to an act of God, fire, flood, storm or element

or casualty, theft, war, disaster, strike, lock-out, boycott, prevailing war or war preparation, or bona fide legal proceedings beyond the control of Franchisee.

- (c) All remedies and penalties under this Agreement, including termination of the franchise, are cumulative and not exclusive. The recovery or enforcement by one available remedy or imposition of a penalty is not a bar to recovery or enforcement by other remedy or imposition of other penalty. City reserves the right to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon Franchisee under this Agreement. A specific waiver of a particular breach of a term, condition or obligation imposed on Franchisee under this Agreement shall not be a waiver of any other or subsequent breach of the same or other term, condition or obligation.
- (d) City preserves the right to adopt such additional regulations as it finds necessary in the exercise of its police power, provided that such regulations or ordinances are reasonable and not in conflict with the rights granted in this Agreement. At all times during the term of this Agreement, Franchisee shall be subject to all lawful exercise of the police power by the City, and to such reasonable regulations that the City may subsequently provide by resolution or ordinance. With regard to this franchise, City reserves the right to exercise all authority now or hereafter granted to the City by state statute or City charter, except where such authority may be modified or superseded by the Constitutions of the United States or the State of Oregon. Franchisee reserves the right to challenge any of the terms and conditions of such additional regulations and ordinances under present or future applicable federal and state law.
- (e) In the event of a suit, arbitration or other proceeding of any nature whatsoever, including without limitation, a proceeding under the U.S. Bankruptcy Code, is instituted to enforce any provision of this Agreement, the prevailing Party shall be entitled to recover from the losing Party, to the extent allowed by applicable law, its reasonable attorneys, paralegal, accountants and other expert fees, and all other fees, costs, and expenses actually incurred and reasonably necessary in connection with such proceedings, as determined by the judge or arbitrator at trial or arbitration, or on appeal or review, in addition to all other amounts provided by law. To the extent allowed by applicable law, this provision shall cover costs and attorneys' fees related to or with respect to proceedings in Federal Bankruptcy Courts, including those related to issues unique to bankruptcy law.

**Section 11. Assignment.** All rights and privileges granted and duties imposed by this Agreement upon Franchisee shall extend to and be binding

upon Franchisee's successors, legal representatives and assigns. Franchisee shall notify City of any sale or transfer of its plant or system, or a majority control of its plant or system, within sixty days after such transfer occurs.

**Section 12. Notice.** Unless otherwise specifically provided, all notices shall be mailed by US certified mail, return receipt requested, postage prepaid, to the following address:

If to Franchisee: Tina Davis  
Sr. VP & Deputy General Counsel  
tw telecom inc.  
10475 Park Meadows Drive  
Littleton, CO 80124

With a copy to: Lyndall Nipps  
VP-Regulatory  
tw telecom inc.  
845 Camino Sur  
Palm Springs, CA 92262-4157

If to City: City of Tualatin  
Attention: City Attorney  
18880 SW Martinazzi  
Tualatin, OR 97062

**Section 13. Governing Law.** The laws of the State of Oregon govern this Agreement and its interpretation, performance, and enforcement.

**Section 14. Effective Date.** This ordinance shall take effect 30 days after it is adopted and approved by the City Council and is effective for ten years.

INTRODUCED AND ADOPTED THIS 12th DAY OF January, 2009.

APPROVED AS TO LEGAL FORM

  
CITY ATTORNEY

CITY OF TUALATIN

BY 

Mayor

ATTEST:

BY 

City Recorder

WRITTEN ACCEPTANCE OF ORDINANCE NO. 1274-09  
CITY OF TUALATIN, OREGON  
TO THE MAYOR AND COUNCIL OF THE CITY OF TUALATIN

WHEREAS on the 12<sup>th</sup> day of January 2009, the Council of the City of Tualatin, Oregon, passed Ordinance No. 1274-09 entitled:

AN ORDINANCE GRANTING A NON-EXCLUSIVE TELECOMMUNICATIONS  
FRANCHISE TO TW TELECOM OF OREGON LLC

WHEREAS the ordinance was duly signed and approved on the 12<sup>th</sup> day of January, 2009, by the Mayor of Tualatin, and attested by the City Recorder; and

WHEREAS the written acceptance of the ordinance is required by the ordinance,

NOW, THEREFORE, tw telecom of oregon llc accepts Ordinance No. 1274-09 and all the terms and conditions of the ordinance.

IN WITNESS WHEREOF, tw telecom of oregon llc has caused this acceptance to be duly executed this 28<sup>th</sup> day of January, 2009.

tw telecom of oregon, llc  
By: *tw telecom holdings inc., its sole member*

By *Tina Davis*  
Tina Davis  
Senior Vice President  
Deputy General Counsel

CITY OF TUALATIN, OREGON

By *Sherilyn Lombos*  
Sherilyn Lombos, City Recorder